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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROSALINDA DURAN,

Defendant and Appellant.

F058564

(Super. Ct. No. MCR023698)

O P I N I O N

APPEAL from a judgment of the Superior Court of Madera County. Jennifer R. S. Detjen, Judge.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Rosalinda Duran of second degree murder and found that she had suffered two prior strike convictions. (Pen. Code,[1] §§ 187, subd. (a), 667, subds. (b)-(i).) Her invitation to the court to exercise its discretion to dismiss the prior convictions and her motion for a new trial were denied, and she was sentenced to 45 years to life in prison and ordered to pay various fees and fines. She now appeals, raising a number of claims of error. For the reasons that follow, we will affirm.

FACTS

I

PROSECUTION EVIDENCE

At Valley State Prison for Women (VSPW), housing unit A4 holds the Secured Housing Unit (SHU) and the Administrative Segregation Unit (Ad Seg). An inmate deemed a threat to the safety and security of the institution -- for example, if she has been in a fight or is being charged with a felony -- is first placed in Ad Seg. A committee then reviews the inmate's case and, if long-term special housing is deemed necessary or justified, she is moved to the SHU side of the building.

SHU cell 207 is on the top tier of cells. It, like the other SHU cells, contains two bunks and a toilet/sink combination. The floor and bunks are cement, the walls are cinder block, the toilets and sinks are stainless steel, and the cell doors are metal. SHU inmates are only allowed outside in the yard for two and a half hours a day. While in their cells, they have several means of communicating with inmates in other cells.

An inmate in a SHU cell can request to be moved. The building supervisor will evaluate the request and any allegations and determine if there is a good reason to move the inmate. Inmate-on-inmate violence is sometimes difficult for prison staff to investigate because the victim does not want to be perceived as a snitch, which can then subject her to retaliation. In addition, in order to be moved, an inmate will often be

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[1] All statutory references are to the Penal Code.

required to sign an "enemy chrono," confirming that an enemy situation exists between two inmates. Signing an enemy chrono can result in the inmate being considered a snitch.

At approximately 8:19 a.m. on December 20, 2005, Ruben Cano, a licensed vocational nurse, was working in SHU when he heard somebody say, "Help me." The voice sounded like the person was crying. Someone then yelled, "Medical emergency, 207." Cano ran upstairs to cell 207 to find appellant with the light off in the cell. She was about a foot and a half to two feet from the cell door, crying. Because she was so close to the door, all he could see was the top of her shoulders and her head. He could not tell what she was crying about until she said, "I killed her." At that moment, she swung her right fist twice in a downward motion.

Cano put his face against the cell window and was able to see that appellant was straddling inmate Michelle Yglesias, who was face down and naked. He told appellant to stop what she was doing, get off Yglesias, and go to the back of the room. Appellant leaned back, and Cano saw a white electrical cord in her left hand. As appellant leaned back, Yglesias's head came up and appellant hit her on the right side of the head with a closed fist. Cano yelled, "Medical emergency," and activated an alarm. He ordered appellant to stop hitting Yglesias. Appellant responded, "I can't take it no more, Cano. I'm so tired of her beating me." She then swung a couple more times in a downward motion.

When she arrived at the door to the cell, Correctional Officer Mendoza observed appellant at the back of the room, yelling that her roommate needed to go to the hospital. Yglesias was unconscious, ashen-colored, and covered with blood. She was breathing with difficulty and had regurgitated. She was taken to the prison's triage treatment area, where her breathing was found to be slow and irregular. She remained unconscious. Her left pupil was unresponsive and her right pupil was sluggish. Her face and hair were covered with blood and vomit, and she had a large hematoma on the left periorbital area

around the eye and left forehead, and one on the right forehead. Yglesias was transported by ambulance to Madera Community Hospital. She was pronounced dead a short time later.

At the time of death, Yglesias, who was 30 years old, was five feet three inches tall and weighed approximately 270 pounds. The primary cause of death was cerebral concussion, with ligature strangulation as a contributing cause. There was a great deal of bruising on her face, as well as recent bruises and abrasions on her body. There were lacerations on her head and face, and extensive hemorrhage on the surface of the skull, indicating fairly severe trauma to the head. A very large, extensive subdural hematoma formed as a result of the trauma. The trauma that killed Yglesias appeared to be on the right side of the head. Marks on Yglesias's neck indicated there was not merely a single application of the ligature, but rather repositioning and reapplication of pressure. This could indicate movement of the hand applying the ligature, perhaps due to a struggle. The location of the ligature was the lower to middle portion of the neck, where the effect would be to impair respiration. Had the head injuries not existed, the ligature injury alone could have caused death. The ligature marks could be consistent with an electrical cord. No alcohol or drugs were present in Yglesias's system.

II

DEFENSE EVIDENCE

Appellant testified that she was sent to Central California Women's Facility (CCWF) for carjacking and robbery in 2002. She had never been to prison before. She first met Yglesias around the beginning of 2004, when Yglesias was moved into appellant's cell after getting into an altercation with her former cellmates. Later, Yglesias was moved into another unit, after which appellant was also moved to that unit. They were in general population, which was almost like an apartment complex on a yard, when their relationship became romantic.

At first, Yglesias was "real gentle." After three or four months, however, she started changing and became very jealous. She did not like appellant talking to anyone and would ask suspicious questions. At one point, Yglesias had someone follow appellant around and report back on her activities.

Appellant tried to break up with Yglesias a couple of times. It did not go well. Yglesias would cause a big scene. She would try to confine appellant to a certain area. She would want to start fighting, or she would pick a fight with somebody else. Appellant had taken a younger inmate "under [her] wing," and Yglesias would threaten to beat up this individual if appellant kept talking to her. Yglesias also threatened to beat up different people if appellant ever were to break up with her.

After a few months, Yglesias got to the point of calling appellant names. Yglesias would check appellant's possessions as often as she could get her hands on them. Appellant did not allow Yglesias in her cell after a while because she did not like Yglesias pilfering through her things. Yglesias tried to set rules for appellant, such as insisting that appellant throw away drawings and pictures that friends had done for her through the years. Appellant agreed to put her things away, but then discovered Yglesias had a picture of an ex-girlfriend in her locker. When appellant confronted her, Yglesias get very angry. Yglesias cheated on appellant a number of times.

Appellant and Yglesias physically fought a few times while in general population. On one occasion while at CCWF, the two were in Yglesias's room and an argument started. Appellant told Yglesias she was tired. Yglesias started verbally abusing her. Appellant responded that she was not going to take it anymore. While waiting for the cell door to open, which it did at specific times, appellant knelt down to get something out of a drawer, putting her back to Yglesias. Yglesias kicked appellant in the back of the head, knocking her out and sending her to the Madera hospital with a severe

concussion.[2] Appellant refused to say what had happened, pretending instead that she had slipped and fallen, and so nothing happened to Yglesias. Appellant refused to tell because she does not "tattle." There can be consequences for being a snitch; depending on what or who is talked about, the person telling may be harassed or even attacked.

Appellant and Yglesias were placed in separate units. In February 2005, appellant got into a fight with an inmate with whom Yglesias was having an affair. Guards had to pepper-spray appellant to get her to stop fighting. For this, appellant was sent to Ad Seg, which inmates call "jail." Yglesias hit someone so she could follow appellant to Ad Seg. When Yglesias was sent to Ad Seg but appellant was released back to general population, Yglesias sent appellant messages, telling her to come and "visit."

Appellant refused to go to Ad Seg like Yglesias wanted, because she was upset at the dysfunction in their relationship and did not want to be part of it anymore. Yglesias kept writing to appellant and apologizing, so appellant finally "made a visit" by doing a couple of minor things that got her sent to Ad Seg for a weekend on two occasions. Yglesias told appellant what to do in this regard. In Ad Seg, appellant and Yglesias were not allowed to live together. Yglesias made appellant stay single-celled and take several write-ups for refusing cellmates. Appellant and Yglesias were housed next to each other, and they would argue through the doors and walls.

At some point, Yglesias told appellant that she was getting sent to SHU. Appellant did not know anything about how SHU terms worked, but Yglesias told her to fight someone on the yard, so that appellant would get a battery that would result in the SHU term necessary for appellant to follow Yglesias to VSPW SHU. Appellant committed a battery on an inmate in April 2005. She was placed in Ad Seg at CCWF. In

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[2] Other injuries appellant suffered at various times at Yglesias's hands included black eyes, a back injury, a swollen elbow, badly swollen hands, and a dislocated jaw. She just let everything heal naturally or sought treatment from tier nurses who either would not report anything or would falsify medical records and document a slip and fall.

May 2005, she attacked another inmate at Yglesias's behest so that she could get a longer SHU term and stay in SHU with Yglesias. Appellant would not stop fighting until at least four less-than-lethal rounds were fired, two of which struck appellant. Appellant was transferred to VSPW SHU in August 2005. Because Yglesias still had a longer SHU term than appellant, an inmate allowed appellant to "catch a battery on her" by striking her one or two times.[3]

Within a week or two of appellant's arrival in SHU, Yglesias managed to get herself put into appellant's cell, cell 207. There was no arguing at first. This did not last long, however. One day, appellant discovered that Yglesias was still in contact with an inmate with whom she had had an affair. The result was a physical fight started by appellant.

From then on, it seemed like Yglesias was hitting appellant on a "[c]onstant basis." Yglesias would feel sorry and things would die down. She would try to apologize, but appellant would not want Yglesias near her, and this would start another fight. On one occasion, they fought all night, then went to sleep. Yglesias woke up in the same state of mind. Appellant got on top of her first because she knew, from the aggressiveness Yglesias was showing, that she needed to defend herself. Most of the time when they were fighting, appellant was really defending herself. Appellant was five feet nine inches tall, and weighed a little over 200 pounds at the time. Yglesias used her weight a lot. A frequent tactic of hers was to wrap appellant's hair around her (Yglesias's) hand, making it very hard for appellant to get away. In addition, Yglesias would be very aggressive during sex, including sometimes cutting appellant with a razor.

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3 Appellant also committed acts of violence that were unconnected to her relationship with Yglesias. In September 2002, she engaged in mutual combat with an inmate who was a codefendant of appellant's codefendant, and who threatened to kill appellant's daughter. In November 2002, appellant engaged in mutual combat with her cellmate. In March 2006, appellant kicked a table at which a deputy warden and other staff members were seated. In May 2006, she threw liquid on a correctional officer.

Yglesias occasionally would attempt to force herself on appellant, but appellant would fight her off. Appellant sometimes felt her life was in danger, because Yglesias "just wouldn't stop." On one occasion, Yglesias choked appellant until appellant passed out. Yglesias also placed her hands around appellant's throat on other occasions, enough that appellant's voice started to be affected by it. Yglesias would try to do anything she could when they fought. This made appellant sad, because she had a lot of love for Yglesias.

Appellant and Yglesias were in the SHU cell together for four months. During that time, appellant once asked an officer to move her. Sergeant Roam was going to take her out of the cell, but Yglesias told appellant to say that everything was okay. Appellant broke down and told Roam to never mind. At no other time did appellant request that either she or Yglesias be moved.

The day before December 20, 2005, Yglesias decided to brew an alcoholic beverage because it was almost Christmas. It was shared among the four cells that communicated by means of a common vent that acted like a private telephone system. Everyone was having a good time, and they stayed up all night.

Appellant did not know what happened, but she was talking on the bottom "phone" when she heard Yglesias tell two people on the top vent, "I'm going to beat her ass. I'm going to beat her ass. I'm going to fuck her up." Appellant could hear the neighbors telling Yglesias to leave her alone, that she had not done anything.

As breakfast time drew near, the cell needed to be cleaned up so that the drinks would not be seen. Appellant and Yglesias started cleaning up. Appellant noticed that Yglesias's demeanor had changed and she was starting to get aggressive. Even before this incident, appellant could tell when something was going to happen, because Yglesias would start arguing. On this occasion, Yglesias started asking suspicious questions about why a neighbor's girlfriend did not want the neighbor to go outside on the yard with appellant.

Yglesias started taking a bath. Her attitude was already really bad, and appellant wanted to tell her a funny story, but Yglesias cut her off. They started arguing. While Yglesias was bathing, the tier officer came for the breakfast trays. He heard appellant crying. As a curtain was covering the window on the cell door, he asked if appellant was okay. Yglesias was saying profanities and told appellant to give the officers the trays or they would come in. Yglesias accused appellant of wanting the officers to come in so that Yglesias would get in trouble. Appellant got off the bed and handed the trays through the curtain. She did not ask for help.

At first, the argument was only verbal. At some point, however, Yglesias left her bath and started hitting appellant. Appellant asked her to stop, but Yglesias had her on the bed and continued to strike her. She had appellant by the hair and was using her weight to control appellant. Appellant was crying and asking her to stop. Yglesias had appellant pinned down, but her hand came near appellant's face, and appellant bit her finger as hard as she could. This allowed appellant to get Yglesias off of her, but it also upset Yglesias more. She started cussing and mumbling threats. Appellant realized Yglesias was really angry and knew things were going to get worse.

Yglesias was at the sink, rinsing her finger. She was straddling the toilet, mumbling how she was going to "beat [appellant's] ass." Appellant was scared, thinking, "oh, my God, we are really going to get into a good fight this time." Appellant could feel Yglesias's rage. Yglesias had been hitting appellant for a good hour, since before breakfast, but appellant knew that this time, she was really, really mad.

Appellant pulled her hair back as tight as she could and put it in a bun, because Yglesias liked to get hold of her hair to control her. Yglesias saw what she was doing and told appellant to get ready because Yglesias was "going to beat [appellant's] ass now." Appellant rolled up her pants, which were long, and was getting prepared. She knew she was in store for a good fight. She was scared.

Appellant was sitting on the bed. Yglesias was sitting on the toilet seat, repeating over and over that she was going to come and beat appellant. Appellant saw the cord to the television. She unplugged it from the television, walked up behind Yglesias, who was facing the sink and rinsing her finger, and put it around Yglesias's neck to hold her down. She did not intend to strangle or kill Yglesias. She just wanted to control her.

The last thing appellant remembered was putting the cord around Yglesias's neck and twisting it to have a grip on the cord. After that, appellant only remembered flashes of what happened. She did not remember if Yglesias resisted, if there was a struggle, or if she wrapped the cord around Yglesias's neck more than once. She remembered being on top of Yglesias, who was facing her, and hitting Yglesias a couple of times in the face. The next thing she remembered was being on top of Yglesias, who was now face down. Appellant did not know how Yglesias went from face up to face down, or how she went from straddling the toilet to being laid out on the floor. She did not remember if she slammed Yglesias's head into the concrete floor. Appellant saw a pool of blood and got scared. She started screaming for help for Yglesias, and that there was a medical emergency. It took a long time to get a response.

Injuries were found on appellant's body following the incident. There were red marks and scratches on her hands, neck, back, and wrists. One wrist was extensively bruised and the hand appeared swollen. On the arms were bruises of various colors. The shapes of some of these bruises were consistent with bite marks.

Other inmates attested to the violent nature of the relationship between appellant and Yglesias. According to them, Yglesias was jealous, possessive, and controlling. Her altercations with appellant were both verbal and physical. Yglesias was the aggressor. She never had visible injuries, but appellant was seen more than once with black eyes and battered lips. On December 20, Lisa Torres was in SHU cell 106, which had vent access to cell 207. She heard appellant screaming, saying to leave her alone and trying to get help to get out. Torres also heard a lot of screaming and yelling for Yglesias to get off

appellant and stop hitting her. Norma Bowman, whose cell in SHU was below and to the right of cell 207, heard a bad fight between Yglesias and appellant on that day. She could not tell who was being the aggressor, but could hear appellant crying loudly, asking to get out of the room. Bowman wondered why the officers did not help, because she knew they could hear.

Dr. Barnard testified as an expert on intimate partner battering. Intimate partner battering, which used to be called battered women's syndrome, involves a recognized "cycle of violence." In stage one, the tension-building phase, there may be some minor altercations, arguing, and controlling behavior. In stage two, the acute episode, there may be actual physical or sexual violence, or extreme psychological abuse. In stage three, the honeymoon or tranquility stage, the abuser apologizes and promises to change. Then there is more tension, another incident, and the cycle repeats itself. In a long-term relationship, the cycle may repeat over and over again.

If the victim has been through the cycle several times, he or she sort of knows where things are going and, during the tension-building phase, there is the fear and anticipation of knowing it is probably inevitable that some sort of attack or serious domestic violence is going to occur. When it actually does occur, there is usually a great deal of fear, because the victim has no control over how long the abuse will last. He or she does not know whether it will be worse this time or whether he or she will be killed or seriously injured. There is a lot of confusion of the feelings of love and fear that exist at the same time.

The best, though not always accurate, predictor of lethality is the victim's belief that he or she is going to be killed by the abuser. Nobody knows the abuser like the person being abused. That person knows the cues, so that a look or a gesture that might seem benign is known to the victim as a step that leads to abuse. Almost all battered women fight back at some point, sometimes regularly. However, if the victim increases the resistance, the abuse will almost always increase to quell that resistance.

The victim in a battering relationship will often feel that the abuser is invulnerable. In situations that turn lethal, it is common, even if the abuser is immobilized or dead, for the victim still to believe the abuser can cause harm. This is consistent with a battered woman continuing to hit her assailant even after that person has been incapacitated.

Dr. Barnard reviewed information with respect to this case and interviewed appellant. She saw indications in that examination that appellant was suffering from the effects of intimate partner battering. The relationship involved physical abuse, systematic isolation, jealously and control, emotional abuse, and even economic abuse in that Yglesias controlled their limited resources. There were also ongoing, constant threats from Yglesias to appellant of serious physical debilitation, especially once they were in SHU. In addition, there was sexual abuse. It was so brutal that the sexual part of the relationship became an extension of the physical abuse outside the sexual relationship.

Not every battered partner kills his or her abuser. Some victims of intimate partner battering actually do leave the relationship. This is also true in prison. In abusive relationships, there often comes a point when the victim starts to plan an ultimate resolution or way out of the relationship. Killing the abuser is usually spontaneous, as opposed to planned. Appellant reported to Dr. Barnard that her plan to get out of the relationship was that Yglesias was going to parole soon and it would be over.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

Appellant contends the evidence fails to support a second degree murder conviction because it "establishes that it was necessary for appellant to resort to deadly force in self-defense against an imminent threat of great bodily injury or death." Short of that, appellant suggests, the evidence demonstrates no more than voluntary manslaughter based on heat of passion or imperfect self-defense.

"Murder is the unlawful killing of a human being … with malice aforethought." (§ 187, subd. (a).)

> "Malice may be express or implied. [Citation.] It is express 'when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.' [Citation.] It is implied 'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' [Citation.] … [I]mplied malice has both a physical and a mental component, the physical component being the performance of '"an act, the natural consequences of which are dangerous to life,"' and the mental component being the requirement that the defendant '"knows that his [or her] conduct endangers the life of another and … acts with a conscious disregard for life."' [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307-308, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1199.)

"Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen*, *supra*, 9 Cal.4th at p. 307.) An unjustified killing is presumed to be second degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) A defendant bears the burden of raising excuse, justification, or mitigation, but need only raise a reasonable doubt with respect to these matters. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1154.)

A killing committed in so-called perfect self-defense is neither murder nor manslaughter, but instead is justifiable homicide. (§ 197; *People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on another ground in *People v. Chun*, *supra*, 45 Cal.4th at p. 1201.) "For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.]" (*People v. Randle*, *supra*, at p. 994.) The danger must be imminent; mere fear that it will become imminent is not enough. (*People v. Lucas* (1958) 160 Cal.App.2d 305, 310.) Moreover, although the party killing is not precluded from feeling anger or emotions other than fear, those other emotions cannot be causal factors in his or her decision to use deadly force if the killing is to be justified on a theory of self-defense.

The only causation can be the reasonable fear of imminent danger of death or great bodily injury. (*People v. Trevino* (1988) 200 Cal.App.3d 874, 879.)

Manslaughter, which is a lesser included offense of murder, is an unlawful killing without malice. (§ 192; *People v. Cruz* (2008) 44 Cal.4th 636, 664.) The element of malice is negated, and a killing reduced from murder to voluntary manslaughter, when a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury (*People v. Cruz, supra,* at p. 664; *People v. Randle, supra,* 35 Cal.4th at p. 994), or when a defendant kills "upon a sudden quarrel or heat of passion" (§ 192, subd. (a); *People v. Cruz, supra,* at p. 664).

> "'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' [Citation.] '[T]he killing must be "upon a sudden quarrel or heat of passion" [citation]; that is, "suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has ela[ps]ed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter." [Citation.]' [Citation.]" (*People v. Hach* (2009) 176 Cal.App.4th 1450, 1458.)

Although appellant does not expressly say so, it appears she wants us to hold that only justifiable homicide or manslaughter existed as a matter of law. The issues involved are factual ones (see *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1325), and the applicable principles are settled.

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson, supra,* at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the

trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747) or because it might have reached a different verdict (*People v. Silvey, supra,* 58 Cal.App.4th at p. 1326).

The evidence adduced at trial is set out at length, *ante*, and we need not repeat it here. Appellant prepared herself in advance for a physical assault/confrontation, she struck while Yglesias was in somewhat of a vulnerable position and unaware of the impending attack, she applied a ligature to the neck and inflicted severe injuries to the head and, further, appellant implied that she did not care if she never saw Yglesias again.[4] From these actions, jurors reasonably could have found that appellant acted with express or implied malice, thereby rejecting a finding of justifiable homicide or manslaughter, whether based on heat of passion or imperfect self-defense. (Compare *People v. Collins* (1961) 189 Cal.App.2d 575, 589-591.)

Reversal on the ground of insufficiency of the evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The evidence was sufficient to support appellant's conviction of second degree murder.

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[4] When defense counsel asked, "Would you have missed [Yglesias] if you never saw her again?" appellant responded, "At one point." The clear import is that, at the time she killed Yglesias, appellant would not miss her if she never saw her again.

II

ALLEGED INSTRUCTIONAL ERROR

A. Use of CALCRIM Nos. 505 and 571

1. Background

Appellant requested that the trial court instruct the jury with CALCRIM No. 505, regarding justifiable homicide in self-defense. The trial court agreed to do so, and also determined that CALCRIM No. 571, concerning voluntary manslaughter based on imperfect self-defense, would be given. In memorializing the instructional conference for the record, the court stated, without contradiction, that the parties agreed on the language of the instructions.

Pursuant to CALCRIM No. 505, the trial court subsequently instructed the jury, in pertinent part:

> "The defendant is not guilty of murder or manslaughter if she was justified in killing someone else in self-defense. The defendant acted in self-defense if:
>
> "One, the defendant reasonably believed that she was in *imminent danger* of being killed or suffering great bodily injury.
>
> "Two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger.
>
> "And three, the defendant used no more force than was reasonably necessary to defend against that danger.
>
> "*Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be*.
>
> "The defendant must have believed that there was *imminent danger* of great bodily injury to herself." (Italics added.)

Pursuant to CALCRIM No. 571, the court instructed, in relevant portion:

> "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because she acted in imperfect self-defense. [¶] …

"The defendant acted in imperfect defense [*sic*] if:

"One, the defendant actually believed that she was in *imminent danger* of being killed or suffering great bodily injury.

"And two, the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger.

"But three, at least one of those beliefs was unreasonable.

"*Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be*." (Italics added.)

In her motion for a new trial, appellant claimed that CALCRIM No. 505 did not fully explain the test for determining whether a threat was immediate. Appellant argued that the instruction did not define either "imminent" or "future harm," and was written in such a way that a threat about to be fulfilled could be interpreted as being future harm, when in reality self-defense would be permissible under the law because the threatened harm was imminent. The People responded that the instructional language was sufficient since "imminent" was used in accordance with its ordinary meaning and the jury did not ask for clarification. Appellant then asserted that the instruction was contradictory, and the jury misdirected, because of the phrase "Belief in future harm is not sufficient." The trial court found the instruction to be clear, i.e., an imminent threat was sufficient and the reasonable inference from the instruction was that future harm is not imminent harm. Accordingly, it concluded that CALCRIM No. 505 correctly states the law and is not misleading.

Appellant now reprises her claim of error, asserting that CALCRIM Nos. 505 and 571 eliminated the right to act in self-defense against a threat of imminent harm. Pointing to the language of the instructions that we italicized, *ante*, she states:

"The instructions on the one hand said that one may act in self-defense against an imminent threat of harm. Yet the instructions contradicted this directive by telling jurors that there is no right to act in self-defense against a threat of 'future harm' 'no matter how great or how likely' that harm may be. Since a threat of imminent harm is necessarily a future event, the instructions at best were self-contradictory. Reasonable jurors would have

construed the instructions as excluding the application of reasonable or imperfect self-defense against threats of imminent harm, which are necessarily threats of harm in the near future."

2. Analysis[5]

"A court is required to instruct the jury on the points of law applicable to the case, and no particular form is required as long as the instructions are complete and correctly state the law. [Citation.] In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. In making this determination we consider the specific language under challenge and, if necessary, the instructions as a whole. [Citation.]" (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585; accord, *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Jablonski* (2006) 37 Cal.4th 774, 831; see also *People v. Rogers* (2006) 39 Cal.4th 826, 873 [applying reasonable likelihood standard to both ambiguous and conflicting instructions].)

"'Finally, we determine whether the instruction, so understood, states the applicable law correctly.' [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526, fn. omitted.) We independently assess whether instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

The relevant law is settled. For either perfect or imperfect self-defense, the defendant's fear must be of imminent harm. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) "Fear of future harm -- no matter how great the fear and no matter how great the likelihood of the harm -- will not suffice. The defendant's fear must be of

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5 We reject respondent's assertion the claim of error was forfeited by appellant's failure to object to the instructions in a timely manner at trial. There is no forfeiture of an instructional issue where the substantial rights of the defendant have been affected. (§ 1259; *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.) If appellant's claim is meritorious, the instructions were not correct in law and violated her substantial rights by misdirecting the jury on a defense and a lesser included offense, thus requiring no objection for appellate review. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

imminent danger to life or great bodily injury." (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

We find no reasonable likelihood the jury found the instructions self-contradictory or understood them, as appellant asserts, to foreclose jurors from applying perfect or imperfect self-defense against threats of imminent harm. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1212.) "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." (*Boyde v. California* (1990) 494 U.S. 370, 380-381.) There is no reasonable likelihood jurors would fail to understand the difference between imminent danger and future harm, one being immediate and the other not. Accordingly, we conclude the instructions correctly stated the law.

Appellant points to *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187, disapproved on another ground in *People v. Humphrey, supra,* 13 Cal.4th at page 1089, in which the appellate court approved of the trial court's defining "imminent peril" as meaning that "'the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.'" This definition has been quoted with approval by the California Supreme Court (see, e.g., *In re Christian S., supra,* 7 Cal.4th at p. 783), and was incorporated into CALJIC Nos. 5.12 and 5.17, the counterparts of CALCRIM Nos. 505 and 571, respectively.[6]

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[6] CALJIC No. 5.12 states in part: "The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm." CALJIC No. 5.17 says in part: "As used in this instruction, an 'imminent' [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer."

The essence of this legal principle is contained in CALCRIM Nos. 505 and 571 by virtue of their requirement that the defendant must have believed "that the *immediate* use of deadly force was necessary to defend against [that/the] danger." (Italics added.) Appellant asserts, nevertheless, that the concept of imminent peril has a special, technical meaning established by decisional precedent; hence, the trial court had a sua sponte duty to correctly explain or define it. She is wrong.

"In the absence of a specific request, a court is not required to instruct the jury with respect to words or phrases that are commonly understood and not used in a technical or legal sense. [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 503.) Courts do have a duty, however, "to define terms that have a technical meaning peculiar to the law. [Citations.]" (*People v. Bland* (2002) 28 Cal.4th 313, 334.) "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citation.] Thus, … terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance. [Citation.]" (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575.)

Jurors were instructed to apply words and phrases not specifically defined using their ordinary, everyday meanings. Webster's Third New International Dictionary (1986) page 1130 defines "imminent" as "ready to take place : near at hand : IMPENDING." This ordinary, everyday meaning did not differ in any meaningful way from the meaning of the term as contained in the instructions. (See *People v. Rodriguez* (2002) 28 Cal.4th 543, 547; *People v. Richie* (1994) 28 Cal.App.4th 1347, 1361.) Jurors' common understanding of the term was all that was required for them to be able to understand the relevant legal principles. (See *People v. Raley* (1992) 2 Cal.4th 870, 901.) The fact the term has been defined in case law and jury instructions does not alter this conclusion, since those definitions are not "foreign to common usage." (*People v. Richie, supra,* 28 Cal.App.4th at p. 1362.) Accordingly, since the jury did not request clarification of the

term or express confusion concerning the applicable legal concepts, no additional instruction was required. (*People v. Adams* (2004) 124 Cal.App.4th 1486, 1494; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014-1015; see *People v. Aris, supra,* 215 Cal.App.4th at p. 1187 [throughout deliberations, jury repeatedly requested clarification of "imminent"].)

As given, CALCRIM Nos. 505 and 517 correctly stated the law in terms of common, everyday usage. If appellant believed the instructions were incomplete or the pertinent legal concepts needed clarification, it was her duty to request appropriate language. (See, e.g., *People v. Lewis* (2001) 25 Cal.4th 610, 666; *People v. Lang* (1989) 49 Cal.3d 991, 1024.) She did not do so.

B. Absence of Instruction on Heat-of-Passion Voluntary Manslaughter

As previously described, the jury was instructed on voluntary manslaughter based on imperfect self-defense. Defense counsel neither requested, nor did the trial court give, instructions on voluntary manslaughter based on heat of passion. Appellant now contends the trial court's omission was erroneous and constituted federal constitutional error. We disagree.

Manslaughter, an unlawful killing without malice, is a lesser included offense of murder. (*People v. Cruz*, *supra*, 44 Cal.4th at p. 664; *People v. Lewis*, *supra*, 25 Cal.4th at p. 645.) Murder will be reduced to voluntary manslaughter when a defendant kills "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)) or when he or she kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury. (*People v. Cruz*, *supra*, 44 Cal.4th at p. 664.)

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. [Citations.] That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. [Citations.]" (*People v.*

Blair (2005) 36 Cal.4th 686, 744-745.) "[I]n a murder prosecution, this includes the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied." (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)[7]

"'[T]he existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense'" (*People v. Romero* (2008) 44 Cal.4th 386, 403); rather, "the evidence supporting the instruction must be substantial -- that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist. [Citations.]" (*People v. Blair, supra*, 36 Cal.4th at p. 745.) Whether substantial evidence supports the instruction is determined without reference to the credibility of that evidence (*People v. Marshall* (1996) 13 Cal.4th 799, 847), and the testimony of one witness, including the defendant, can constitute sufficient evidence to require the court to instruct on its own initiative (*People v. Lewis*, *supra*, 25 Cal.4th at p. 646). Doubts as to the sufficiency of the evidence to warrant an instruction are resolved in favor of the accused. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) On appeal, we employ a de novo standard and independently review the trial court's failure to instruct on a lesser included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

What distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Although the provocation that "incites the defendant to homicidal conduct in the heat of passion" must be caused by the victim or be conduct reasonably believed by the defendant to have been

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[7] Because we are dealing with a trial court's duty to instruct on its own initiative, we reject respondent's claim that appellant forfeited the issue for purposes of appeal by failing to object to the instructions at trial or by failing to request clarifying or amplifying language.

engaged in by the victim (*ibid*.), it may be physical or verbal (*ibid*.) and can arise from a series of events over a period of time (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1245). The passion aroused need not be rage or anger, but can be any intense, high-wrought, violent, or enthusiastic emotion other than revenge. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163; *People v. Berry* (1976) 18 Cal.3d 509, 515.) Fear and panic are such emotions. (See *People v. Breverman*, *supra*, 19 Cal.4th at pp. 163-164.)

"'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."' [Citation.]" (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.) "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) To satisfy the subjective component, "[t]he defendant must actually, subjectively, kill under the heat of passion. [Citation.]" (*Ibid*.) To satisfy the objective, "reasonable person" component, the defendant's heat of passion must be due to sufficient provocation. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 584.)

The test of adequate provocation is objective: "The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment." (*People v. Lee*, *supra*, 20 Cal.4th at p. 60.) This is so "because 'no defendant may set up [her] own standard of conduct and justify or excuse [herself] because in fact [her] passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable [person].' [Citation.]" (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1252-1253.) Because the test of sufficient provocation is objective -- based on a reasonable person standard -- the fact the defendant "has particular susceptibilities to events is irrelevant in determining whether the claimed provocation was sufficient. [Citation.]" (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.)

To reduce murder to voluntary manslaughter, provocation and heat of passion must both be affirmatively shown. (*People v. Steele, supra,* 27 Cal.4th at p. 1252.) In the present case, "[i]n the face of [appellant's] own testimony, no reasonable juror could conclude [appellant] acted '"'rashly or without due deliberation and reflection, and from this passion rather than from judgment …'" [citations]' [citation]" (*People v. Moye* (2009) 47 Cal.4th 537, 553), because, according to appellant, she prepared herself to deal with Yglesias by pulling back her hair so Yglesias could not use it to gain advantage, deliberately took an electrical cord, and purposefully wrapped it around Yglesias's neck from behind to control her. "In short, the thrust of [appellant's] testimony below was self-defense -- both reasonable self-defense …, and unreasonable or imperfect self-defense …. There was insubstantial evidence at the close of the evidentiary phase to establish that [appellant] 'actually, subjectively, kill[ed] under the heat of passion.' [Citations.]" (*Id.* at p. 554.) Accordingly, there was no instructional error.

Even if we were to find error, however, we would conclude it was harmless. "The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836-837 [(*Watson*)]." (*People v. Rogers, supra,* 39 Cal.4th at pp. 867-868.)[8] Under *Watson,* reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error. (*People v. Rogers, supra,* at p. 868.)

Under the evidence, if appellant's reason was obscured, it was obscured by fear. Appellant herself testified that she had never felt such fear in her life, and defense counsel argued fear to the jury. If the jury had accepted appellant's testimony in this

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8 The only possible exceptions are when the failure to instruct renders a capital verdict unreliable under the Eighth Amendment to the United States Constitution, and when the error deprives the defendant of the federal due process right to present a complete defense. (*People v. Rogers, supra,* 39 Cal.4th at p. 868, fn. 16; *People v. Breverman, supra,* 19 Cal.4th at p. 178.) Neither such situation exists here. (See *People v. Rogers, supra,* at pp. 871-872 [explaining when failure to instruct deprives defendant of right to present complete defense].)

regard, it would have convicted her, if at all, of voluntary manslaughter on a theory of imperfect self-defense. As the California Supreme Court said in *People v. Moye*, *supra*, 47 Cal.4th at page 557, in finding harmless a failure to instruct on heat-of-passion voluntary manslaughter where instructions were given on imperfect self-defense manslaughter:

> "Once the jury rejected defendant's claims of reasonable and imperfect self-defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he *subjectively* harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense…. [¶] Moreover, the jury having rejected the factual basis for the claims of reasonable and unreasonable self-defense, it is not reasonably probable the jury would have found the requisite *objective* component of a heat of passion defense (legally sufficient provocation) even had it been instructed on that theory of voluntary manslaughter."

III

POSTVERDICT *MARSDEN* ISSUES

Appellant contends the trial court erroneously refused to (1) conduct a postverdict *Marsden*[9] hearing, and (2) appoint replacement counsel to investigate and present a motion for new trial challenging trial counsel's performance. We find no error.

A. Background

On December 13, 2008, appellant wrote a letter to the trial court, asking for a substitution of appointed counsel and stating various reasons. A *Marsden* hearing was scheduled, at which she withdrew her request. On February 6, 2009, appellant submitted a written *Marsden* motion. At the February 17 hearing on the motion, she asserted that defense counsel (presumably Mr. Fitzgerald, although she was represented by Mr. Fitzgerald and Mr. Meyer at trial, which began May 7, 2009) would not investigate

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9 *People v. Marsden* (1970) 2 Cal.3d 118.

matters or file motions in accordance with her wishes. Specifically mentioned by appellant were: rechecking with the coroner about the time of Yglesias's death, since Yglesias was injured but alive when taken to the jail infirmary and did not receive proper medical care; a change of venue motion; an insanity plea; and some letters appellant had written to someone concerning a battery. Appellant also asserted that counsel was dragging out proceedings; not giving her discovery; and telling her that her best chance was 22 years. The trial court had defense counsel respond, found that appellant was receiving competent representation, and denied the motion.

At the sentencing hearing, appellant read the following written statement:

> "I want the record to reflect the following issues:
>
> "I requested my attorney to interview a witness and use this witness in my trial.
>
> "At this point he wasn't an adequate attorney and denied me the right to a fair, adequate counsel.
>
> "I then asked the Court for a Marsden Hearing to dismiss my attorney for ineffective assistance of counsel and inadequate investigation to help prepare a defense. The Court denied my request for a new counsel.
>
> "I want the record to reflect for appeal purpose that I object to the above actions.
>
> "I object to my trial being done with said counsel.
>
> "I object to the Court's decisions to have trial with said counsel.
>
> "And I object to all proceedings, evidence and outcome of trial.
>
> "And I object to the Court denying me a change of venue due to the publicity in the newspapers and even if -- I also request a 17(b) hearing.
>
> "And then I want to object to the proceedings and make sure the record reflects all my objections and grievances.
>
> "I am requesting to be granted a new trial with a new lawyer, I be allowed to have witnesses I have and have help to prepare a defense for myself and a hearing to be held by either a judge or a jury under the *United States versus Perez* 280 F3D 318 stating venue should be decided by the

jury when challenged by the defendant. Or if that case don't apply I want to stand on whatever cases may apply to all these issues.

"I object to the sentence and any enhancements that may be attached to it all.

"I object to the restitution as I have no means of paying the fines. The minimum court fine of $200 is all I should be fined."

After Yglesias's mother addressed the court, the court stated:

"The Marsden Motion that the defendant is referring to occurred I believe on February 17th, 2009. [¶] The defendant's request to reduce the case to a misdemeanor under 17(b) is denied. It is not a wobbler. And even if it were, the facts and the defendant's record do not justify reducing it to a misdemeanor. [¶] Defendant's motion for new trial, her own motion that she made just now, and her request for new counsel is denied. [¶] Her request for new trial based on request for new counsel, if I'm phrasing that correctly, I think that's what she said, is denied."

The trial court then proceeded to pronounce sentence.

B. Failure to Conduct *Marsden* Hearing

In *People v. Freeman* (1994) 8 Cal.4th 450, 480-481, the California Supreme Court set out the applicable law as follows:

"In *People v. Marsden*, *supra*, 2 Cal.3d at page 124, we held that 'a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney.' Because of this, '[w]hen a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate. Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' [Citation.] '[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel.' [Citation.] 'We do not necessarily require a proper and formal legal motion, but at least some clear indication by defendant that he wants a substitute attorney.' [Citation.]"

"A criminal defendant is entitled to raise his or her dissatisfaction with counsel at any point in the trial when it becomes clear that the defendant's right to effective legal representation has been compromised by a deteriorating attorney-client relationship." (*People v. Roldan* (2005) 35 Cal.4th 646, 681, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord, *People v. Lopez* (2008) 168 Cal.App.4th 801, 814.) As we have cautioned, however,

> "[t]he trial court is not obliged to initiate a *Marsden* inquiry sua sponte. [Citation.] The court's duty to conduct the inquiry arises 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.' [Citations.] The defendant is not entitled to claim that an irreconcilable conflict has arisen merely because of a disagreement with counsel over reasonable tactical decisions. [Citations.]" (*People v. Lara* (2001) 86 Cal.App.4th 139, 150-151; accord, *People v. Leonard* (2000) 78 Cal.App.4th 776, 787.)

The foregoing principles "appl[y] equally preconviction and postconviction.… A defendant has no greater right to substitute counsel at the later stage than the earlier." (*People v. Smith* (1993) 6 Cal.4th 684, 694.)

When appellant's statement to the trial court is considered in context and as a whole, it is apparent to us that her grievances and request for a new trial with new counsel were not a new, present request for substitution of attorneys, but instead were a complaint about the trial court's previous *Marsden* ruling. This being the case, the trial court was not required to conduct a new *Marsden* hearing. Moreover, appellant was permitted to state her reasons for any dissatisfaction. Inasmuch as none of them suggested a claim of ineffective assistance of counsel unrelated to, or occurring after, the earlier *Marsden* hearing, the trial court was not required to conduct further inquiry. (Compare *People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367-1368; *People v. Eastman* (2007) 146 Cal.App.4th 688, 695-696.)

C. Refusal to Appoint Replacement Counsel to Investigate/Present New Trial Motion

> "'When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. [Citations.] If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a "colorable claim" of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]' [Citation.]" (*People v. Bolin, supra,* 18 Cal.4th at p. 346.)

It has been held that when a defendant seeks a new trial based on his or her trial attorney's alleged incompetence, a trial court's duty to conduct a *Marsden* inquiry is triggered even if the defendant does not state that he or she wants another attorney. (*People v. Mendez, supra,* 161 Cal.App.4th at pp. 1366-1367; *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1084, 1086-1087; *People v. Kelley* (1997) 52 Cal.App.4th 568, 579-580; *People v. Stewart* (1985) 171 Cal.App.3d 388, 395-396, disapproved on another ground in *People v. Smith, supra,* 6 Cal.4th at p. 694; but see *People v. Richardson* (2009) 171 Cal.App.4th 479, 484-485.)

In the present case, appellant's claim of ineffective assistance of counsel was made in terms of, and based on, the reasons stated at the original *Marsden* hearing. Because nothing appellant said suggested she was claiming ineffective assistance of counsel unrelated to, or arising after, the earlier hearing, the trial court was not required to conduct a new *Marsden* inquiry or to appoint new counsel to investigate and/or present a new trial motion challenging trial counsel's competence.

IV

SENTENCING ISSUES

A. Denial of *Romero* Request

As previously stated, appellant was sentenced to 45 years to life in prison. The term was calculated as the 15-year-to-life term for second degree murder, tripled under the three strikes law. Appellant now contends the trial court abused its discretion by refusing to impose the nonstrike term of 15 years to life. We do not agree.

1. Background

The probation officer's report (RPO) showed that appellant, who was born in 1978, had a criminal record as an adult that consisted of a misdemeanor conviction of being under the influence of a controlled substance, and 2002 convictions for robbery and carjacking. These latter convictions, which each constituted a strike, arose out of the same case.

Prior to sentencing, appellant submitted a written invitation to the trial court to exercise its discretion and dismiss the prior strike convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Appellant argued that she had a minimal prior record, that her two strike offenses occurred in a single course of conduct, and that the jury verdict did not negate the fact that appellant was repeatedly abused by Yglesias. The People opposed the request. After argument, during which defense counsel urged the court to vacate one strike if it were not inclined to vacate both, the trial court reviewed appellant's criminal record and concluded: "The crime that was committed that led to this conviction occurred in the state prison. The facts indicated a very brutal killing. Court does not find that the defendant is outside the parameters of the Three Strikes Law and denies the Romero Motion."

2. Analysis

Trial courts have limited discretion under section 1385 to dismiss prior convictions in three strikes cases. (*Romero*, *supra*, 13 Cal.4th at p. 530.) "In reviewing

for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) When sentencing pursuant to the three strikes law, objectives include protection of public safety and punishment of recidivism. (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1251.)

> "Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra,* 33 Cal.4th at p. 377.)

In deciding whether to dismiss or vacate a prior strike allegation or finding, or in reviewing such a ruling,

> "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

By establishing a sentencing norm, circumscribing the trial court's power to depart from that norm, and requiring the court explicitly to justify its reasons for doing so, "the [three strikes] law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*People v. Carmony, supra,* 33 Cal.4th at p. 378.) These include situations in which the trial court was not aware of its discretion to dismiss,

considered impermissible factors in declining to dismiss, or where the sentencing norms produce, as a matter of law, an arbitrary, capricious, or absurd result under the specific facts of a particular case. (*Ibid*.) They do not include situations in which reasonable people might disagree about whether to strike one or more prior conviction allegations. (*Ibid*.)

"The [California] Supreme Court has … made clear that a decision to strike a prior is to be an individualized one based on the particular aspects of the current offenses for which the defendant has been convicted and on the defendant's own history and personal circumstances." (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) Here, the record shows the trial court took appropriate factors into consideration in making its decision. Contrary to appellant's assertion on appeal, the record is indeed sufficient to support a murder conviction. Moreover, although every third strike candidate has at least two prior strike convictions, the trial court did not rely on that fact, but on the fact that the present offense occurred while appellant was in prison. In addition, although appellant's strike convictions apparently arose from a single course of conduct, both prior offenses necessarily were committed by means of force or fear, and the killing giving rise to the current conviction was very brutal. (Compare *People v. Garcia* (1999) 20 Cal.4th 490, 503.)

Under the circumstances, appellant's case does not present the type of extraordinary situation in which she *must* be deemed to fall at least partially outside the spirit of the three strikes law. (See *People v. Carmony*, *supra*, 33 Cal.4th at p. 378.) Accordingly, the trial court did not abuse its discretion in denying appellant's *Romero* request.

B. Cruel and/or Unusual Punishment

Appellant contends her sentence is grossly disproportionate, and so violates the federal and state Constitutions. We disagree.[10]

The Eighth Amendment to the United States Constitution prohibits infliction of "cruel *and* unusual" punishment. (Italics added.) Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel *or* unusual" punishment. (Italics added.) The distinction in wording "is purposeful and substantive rather than merely semantic. [Citations.]" (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.) As a result, we construe the state constitutional provision "separately from its counterpart in the federal Constitution. [Citation.]" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) This does not make a difference from an analytic perspective, however. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fn. 7.) The touchstone in each is gross disproportionality. (See *Ewing v. California* (2003) 538 U.S. 11, 21 (lead opn. of O'Connor, J.); *Rummel v. Estelle* (1980) 445 U.S. 263, 271; *People v. Dillon* (1983) 34 Cal.3d 441, 479.) "'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations.]' [Citation.]" (*People v. Mantanez, supra*, 98

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10 Respondent says the argument is waived because appellant failed to make it in the trial court. (See, e.g., *People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Kelley, supra*, 52 Cal.App.4th at p. 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; but see *People v. Meeks* (2004) 123 Cal.App.4th 695, 706-707.) Appellant says defense counsel's assertion, that a sentence of 45 years to life was too severe, was sufficient to place the trial court on notice that she was objecting to the sentence as disproportionate and excessive. (See *People v. Williams, supra*, 17 Cal.4th at p. 160 [*Romero* suggests defendant's constitutional rights, which must be considered in making section 1385 determination, include guarantees against disproportionate punishment]; *Romero, supra*, 13 Cal.4th at p. 530.) We need not decide the question since, as the matter is fully briefed and we have the authority to determine whether a sentence results in cruel and/or unusual punishment (*People v. Meeks, supra*, 123 Cal.App.4th at pp. 706-707), we will address the claim on the merits.

Cal.App.4th at p. 358.) A defendant must overcome a "considerable burden" when challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

> "The Eighth Amendment to the United States Constitution … 'contains a "narrow proportionality principle" that "applies to noncapital sentences."' (*Ewing v. California*[, *supra*, 538 U.S. at p. 20] (lead opn. of O'Connor, J.), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 ….) That principle prohibits '"imposition of a sentence that is grossly disproportionate to the severity of the crime"' (*Ewing v. California*, *supra*, 538 U.S. at p. 21 … (lead opn. of O'Connor, J.), quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 271 …), although in a noncapital case, successful proportionality challenges are '"exceedingly rare"' (*Ibid.*)" (*People v. Meeks*, *supra*, 123 Cal.App.4th at p. 707; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 72; *People v. Carmony*, *supra*, 127 Cal.App.4th at pp. 1075-1076.)
>
> "A proportionality analysis requires consideration of three objective criteria, which include '(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.' (*Solem v. Helm* (1983) 463 U.S. 277, 292 ….) But it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 1005 … (conc. opn. of Kennedy, J.).)" (*People v. Meeks*, *supra*, 123 Cal.App.4th at p. 707.)

Considering the gravity of the offense and the harshness of the penalty, we find no gross disproportionality here and, accordingly, we need not examine the second and third criteria. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 1005 (conc. opn. of Kennedy, J.).) We recognize it was undisputed that appellant was the recipient of frequent violence at Yglesias's hands. Nevertheless, the evidence was clearly sufficient to sustain the jury's verdict of a very brutal second degree murder committed by one who had committed two other violent offenses in the past. Appellant's sentence punished not only her current crime, but also her recidivism. Under the circumstances, we conclude that a sentence of 15 years to life in prison, tripled under the three strikes law, does not offend the United States Constitution. (See *Harmelin v. Michigan*, *supra*, at pp. 994-995; *id.* at pp. 996-

997, 1004-1005 (conc. opn. of Kennedy, J.) [upholding imposition of mandatory term of life in prison without the possibility of parole for possession of more than 654 grams of cocaine].)

We now turn to an analysis under state law.

> "A punishment may violate the California Constitution 'although not cruel or unusual in its method, [if] it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* [(1972)] 8 Cal.3d [410,] 424.) [¶] The court in *In re Lynch* spoke of three 'techniques' the courts have used to administer this rule, (1) an examination of the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' [citation], (2) a comparison of the challenged penalty with the punishments prescribed for more serious offenses in the same jurisdiction [citation], and (3) 'a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision' [citation]." (*People v. Meeks*, *supra*, 123 Cal.App.4th at p. 709.)

Punishment need not be shown to be disproportionate in all three respects in order to be ruled unconstitutionally excessive. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38.)

As appellant does not undertake a comparison of her sentence with sentences for other crimes in California or the same offense in other jurisdictions, we focus only on the nature of the offense and offender. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 846.)

> "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1078.)

The nature of the offense is viewed both in the abstract and with a consideration of the totality of the circumstances surrounding its actual commission. The nature of the offender focuses on the person before the court. (*People v. Martinez* (1999) 76

Cal.App.4th 489, 494.) "As under the federal standard, a defendant's history of recidivism, which is part of the nature of the offense and the offender, justifies harsh punishment. [Citations.]" (*People v. Meeks, supra*, 123 Cal.App.4th at p. 709.)

When viewed in the abstract, appellant's crime presents a high level of danger to society. Moreover, a consideration of the circumstances surrounding the actual commission of the offense does not suggest appellant's sentence was unconstitutional. The jury rationally rejected appellant's claim that she feared for her life when she prepared herself to attack Yglesias and then wrapped the electrical cord around the woman's neck while she was turned away. Nor is appellant assisted by the "branch of the inquiry [that] focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as [her] age, prior criminality, personal characteristics, and state of mind." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 479.) Appellant was in her late 20's when she killed Yglesias, and nothing in the record suggested she was immature intellectually, socially, or emotionally. (Compare *People v. Dillon*, *supra*, at pp. 482-483.) The jury rejected her claim that she acted, whether reasonably or unreasonably, in self-defense. (Compare *People v. Dillon*, *supra*, at pp. 484-486.) Moreover, the evidence showed appellant to be capable of violence apart from her relationship with Yglesias, both in terms of the offenses that resulted in her being sent to prison, and in terms of her dealings with those inside the prison. Under the circumstances, we conclude appellant's sentence is not "so disproportionate to the crime for which it [was] inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch*, *supra*, 8 Cal.3d at p. 424, fn. omitted.)

V

MISCELLANEOUS CONTENTIONS

In conjunction with several issues, appellant contends that the trial errors cumulatively denied her her rights to due process and a fundamentally fair trial. Her

briefing in this regard violates California Rules of Court, rule 8.204(a)(1)(B), which requires that each brief state each point under a separate heading or subheading, by simply adding a paragraph asserting cumulative prejudice where purportedly applicable. In any event, we have examined the entire record and are persuaded that if errors occurred, they were not prejudicial either by themselves or in combination with each other. Appellant received a fair trial. (See *People v. Boyette* (2002) 29 Cal.4th 381, 468.)

Appellant also asserts that several alleged errors violated the federal constitutional guarantee of substantive due process. The briefing on this issue, which, for the most part, is not set out under a separate heading or subheading, simply consists of appellant's bald assertion, followed by the citations of several cases. There is no discussion of why substantive due process has allegedly been violated, or how the cases cited are applicable to appellant's case. Simply stating a claim does not make it so, and we decline to address the issue further. (See *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

DISPOSITION

The judgment is affirmed.

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Levy, Acting P.J.

WE CONCUR:

_____
Dawson, J.

_____
Poochigian, J.